IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

DAVID ELLIOTT, Plaintiff, vs. COLOR-BOX, LLC, Defendant.	No. C03-1042 **ORDER**

This matter comes before the court pursuant to defendant's December 15, 2004 motion for summary judgment (docket number 26). The parties have consented to the exercise of jurisdiction by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c). For reasons set forth below, defendant's motion is granted.

The plaintiff, David Elliot, claims that defendant, Color-Box, L.L.C.,engaged in a practice or pattern of age discrimination which culminated in his constructive discharge, in violation of the Age Discrimination in Employment Act (ADEA), as codified at 29 U.S.C. § 621 et seq. The defendant moves for summary judgment on the plaintiff's age discrimination claim arguing that the undisputed facts demonstrate that the plaintiff was not constructively discharged and not otherwise discriminated against based upon his age.

SUMMARY JUDGMENT

A motion for summary judgment may be granted only if, after examining all of the evidence in the light most favorable to the nonmoving party, the court finds that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Kegel v. Runnels, 793 F.2d 924, 926 (8th Cir. 1986). Once the movant has properly supported its motion, the nonmovant "may not rest upon the mere allegations

or denials of [its] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "To preclude the entry of summary judgment, the nonmovant must show that, on an element essential to [its] case and on which it will bear the burden of proof at trial, there are genuine issues of material fact." Noll v. Petrovsky, 828 F.2d 461, 462 (8th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)). Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" Metge v. Baehler, 762 F.2d 621, 625 (8th Cir. 1985) (quoting Impro Prod., Inc. v. Herrick, 715 F.2d 1267, 1272 (8th Cir. 1983)).

The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resort to speculation. Sprenger v. Fed. Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001). The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. Id. Although it has been stated that summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case. Helfter v. UPS, Inc., 115 F.3d 613, 615-16 (8th Cir. 1997). The standard for the plaintiff to survive summary judgment requires only that the plaintiff adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if that evidence did not directly contradict or disprove defendant's articulated reasons for its actions. O'Bryan v. KTIV Television, 64 F.3d 1188, 1192 (8th Cir. 1995). To avoid summary judgment, the plaintiff's evidence must

show that the stated reasons were not the real reasons for the plaintiff's discharge and that the prohibited discrimination was the real reason for the plaintiff's discharge. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) (quoting the district court's jury instructions).

STATEMENT OF MATERIAL FACTS[1]

Until August 30, 2002, the plaintiff worked as a supervisor at a box plant in Dubuque which was most recently owned and operated by the defendant and manufactures corrugated graphic packaging. During the plaintiff's tenure at the box plant, which began in 1966, he worked in almost every department. He was a knowledgeable employee who was familiar with all, or nearly all, of the equipment in the box plant. He received generally positive performance evaluations. On December 28, 2001, Bill Slaught met with the plaintiff and told him that the defendant wished to use his knowledge and skills as a trainer to train third shift employees in the finishing department. The plaintiff told Slaught that he felt that the transfer was because of his age and because the [expletive omitted] company didn't have enough lawyers. Slaught responded that the transfer was not age based. The plaintiff was permanently transferred to third shift (11:00 p.m. to 7:00 a.m.), effective January 2, 2002. Prior to the transfer, the plaintiff was working on first shift (7:00 a.m. to 3:00 p.m.) as a supervisor in the finishing department. The plaintiff had been working on first shift since 1981. Other than the change in working hours, the plaintiff's benefits and job duties remained the same, and he actually received a pay increase at about this time. At the time of the plaintiff's shift transfer, he was 54 years old. Plaintiff turned 55 in September 2002.

[1]Where disputed, the facts are taken in a light most favorable to plaintiff, as the nonmoving party.

On or about June 3, 2002, the plaintiff was transferred to second shift (3:00 p.m. to 11:00 p.m.) on a temporary basis to train a new supervisor, Danny Walker. In discussing this transfer, Slaught made a comment to the plaintiff to the effect that this transfer might help the plaintiff sleep better. This transfer was intended to be temporary, but at some point, the plaintiff asked Slaught to leave him on second shift because he would be leaving the company soon. Slaught complied with the plaintiff's request.

The plaintiff requested information concerning a voluntary retirement package. In July 2002 the plaintiff submitted an "Intent to Quit" form announcing his voluntary resignation. The form indicated that the plaintiff intended to retire effective September 9, 2002. It was the plaintiff's plan to begin working with his son, who runs a restaurant equipment business, upon leaving his employment with the defendant. The plaintiff's last active day of employment with the defendant was August 30, 2002. Plaintiff requested and received a lump sum payout of his retirement benefits. On September 14, 2002, the plaintiff's position was filled by a 43 year old man.

The plaintiff was familiar with the different avenues for making complaints of discrimination within the defendant. He has received training on these complaint procedures and subsequently trained the employees who reported to him. The plaintiff never complained to the division human resources representative about the shift changes and he never called the corporate EEO office, although he did complain to Slaught, as outlined above, and he told Greg Parks, defendant's human resource manager, that he felt he was getting shafted like everyone else that gets to be fifty, fifty-five years old, although the plaintiff cannot remember the time frame in which he spoke to Parks. Parks does not recall this conversation. The plaintiff testified that he "didn't want to go to these folks [Dubuque Human Rights Commission] and have them make a big stink before I was actually out of the place because I was afraid as soon as they found out I would have been gone." Defendant's Appendix p. 16. The plaintiff further testified that he feared that he

would lose his 401k and his stock option investments, although he identifies nothing upon which he bases his concern.

CONCLUSIONS OF LAW

Pattern or Practice

The plaintiff claims that he was a victim of the defendant's "pattern or practice" of age discrimination. According to the plaintiff, it was the defendant's "pattern or practice" to transfer supervisors who had attained the age of 55 off of first shift and then continually transfer them, which created undesirable working conditions to the point that most of them chose early retirement. The plaintiff states in his affidavit that he did not know of any supervisor who, upon attaining the age of 55, was not either transferred to an undesirable shift or dismissed. According to the plaintiff, 18 different supervisory employees were either terminated or moved to less desirable shifts as they neared 55 years of age and none were retained on the same shift.

The defendant disputes the plaintiff's "pattern or practice" claim both from a legal standpoint and on an evidentiary basis. The defendant argues that "pattern or practice" claims are only applicable in class actions, not in individual, disparate treatment cases. The court agrees. See Bacon v. Honda of America Mfg., Inc., 370 F.3d 565, 575 (6th Cir. 2004) ("We therefore hold that the pattern-or-practice method of proving discrimination is not available to individual plaintiffs.") (citing Lowrey v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998); Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2d Cir. 1998)). "We subscribe to the rationale that a pattern-or-practice claim is focused on establishing a policy of discrimination; because it does not address individual hiring decisions, it is inappropriate as a vehicle for proving discrimination in an individual case." Id. "The Supreme Court has never applied the Teamsters method of proof in a private, non-class suit charging employment discrimination. Rather, the Court has noted

that there is a 'manifest' and 'crucial' difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." Lowrey, 158 F.3d at 761 (citing Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 876 (1984)). "Pattern or practice" evidence may, however, be relevant in establishing an individual claim disparate treatment claim under the McDonnell Douglas framework. Bacon, 370 F.3d at 575. Thus, the court will address the quality of the plaintiff's "pattern or practice" evidence in its analysis of plaintiff's disparate treatment claim.[2]

Disparate Treatment

The ADEA makes it unlawful for employers to discriminate on the basis of an individual's age if the individual is over 40 years old. 29 U.S.C. §§ 623(a)(1), 631(a). "It is axiomatic that employment discrimination need not be proved by direct evidence, and indeed, that doing so is often impossible, because as the Supreme Court has said, '[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes.'" Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1108 (8th Cir. 1994) (quoting United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983)). Thus, a plaintiff may demonstrate age discrimination by either direct or indirect evidence. Montgomery v. John Deere & Co., 169 F.3d 556, 559 (8th Cir. 1999) (citing Beshears v. Asbill, 930 F.2d 1348, 1353 (8th Cir. 1991)). When analyzing disparate treatment age discrimination cases based on circumstantial evidence, as is this case, courts apply the burden-shifting analysis developed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and its

[2]Even applying the Teamsters analytical framework, the court finds the evidence insufficient to establish either that age discrimination was the defendant's standard operating procedure or that any such practice was operative in the plaintiff's individual case. See International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

progeny. Gaworski, 17 F.3d at 1108. See Beshears v. Asbill, 930 F.2d 1348, 1353 n.7 (8th Cir. 1991) (applying the McDonnell Douglas framework to an ADEA claim).

"Under this analysis the plaintiff has the initial burden of establishing a prima facie case of discrimination, which 'creates a presumption that the employer unlawfully discriminated against the employee.'" Berg v. Bruce, 112 F.3d 322, 327 (8th Cir. 1997) (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254 (1981)). The burden of production then shifts to the employer to rebut the presumption by articulating a legitimate non-discriminatory reason for its action. Id. (citing Burdine, 450 U.S. at 253). If the employer carries this burden, the burden shifts back to the plaintiff to show that the employer's proffered reason is merely a pretext for discrimination. Id. The plaintiff retains the burden of persuasion at all times and accordingly the plaintiff must present sufficient evidence to persuade the trier of fact that the adverse employment action was motivated by intentional discrimination." Id. "This framework is designed as a 'sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination.'" Gaworski, 17 F.3d at 1108 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978)).

To establish a prima facie case of age discrimination, the plaintiff must prove that: (1) he was in the age group protected by the ADEA; (2) he was adequately performing his job; (3) he suffered a materially adverse employment action; and (4) he was replaced by a younger person. Id. (citing Lowe v. J.B. Hunt Transp., Inc., 963 F.2d 173 (8th Cir. 1992)). The parties' dispute regarding plaintiff's prima facie case centers around the third element, i.e., the adverse employment action. The plaintiff claims that the shift changes, in and of themselves constitute a materially adverse employment action. The plaintiff also argues that the shift changes, coupled with his previous observations and perceptions of how the defendant had treated similarly situated supervisors, was a harbinger of his

imminent dismissal, which caused his employment situation to become so intolerable that he was required to retire, i.e., he was constructively discharged.

The defendant argues that summary judgment must enter in its favor because: (1) the plaintiff's shift changes do not, as a matter of law, constitute materially adverse employment actions; (2) there is no evidence that plaintiff was subjected to objectively intolerable working conditions as to support his constructive discharge claim; and (3) there is no evidence that the defendant deliberately created intolerable working conditions with the intention of forcing the plaintiff to retire. In support of its arguments, defendant points to the fact that the defendant's pay, benefits, and duties were unaffected by the shift change. In fact, the plaintiff actually received a pay raise around the time he was transferred to third shift. Defendants further argue that the plaintiff's actions in working eight months on second and third shifts prior to his resignation belie his contention that the working conditions were intolerable.

The court finds the plaintiff's shift changes do not constitute materially adverse employment actions. Accepting that second and third shifts are less desirable work assignments than first shift, especially perhaps for employees in their fifties, not everything that makes an employee unhappy is an adverse employment action. See Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490, 496 (8th Cir. 1996) ("Dissatisfaction with a work assignment is, as a matter of law, normally not so intolerable as to be a basis for constructive discharge."). Moreover, there is no competent evidence in the record demonstrating that the shift change was meant to punish or humiliate the plaintiff, or that the shift change was a harbinger of the plaintiff's imminent dismissal. Tidwell, 93 F.3d at 496. The plaintiff admitted in his deposition that he had no first-hand knowledge of the circumstances surrounding the transfer and/or discharge of any of the 18 purportedly similarly situated supervisors. Of the five individual supervisors listed in the plaintiff's affidavit, Erv Auderer's transfer occurred in the 1980s and he continued on second shift

until his retirement in 2002. Steve Palmer's transfer occurred sometime in the 1990s. Bob Schneider worked on third shift for over a year following his transfer and Bob Jocum continued on second shift for several years. According to Parks' affidavit, more than two-thirds of the salaried employees at defendant's Dubuque plant are 40 years of age or older, and six out of 26 salaried employees are 55 years of age or older. Plaintiff's shift changes do not, as a matter of law, constitute materially adverse employment actions for purposes of establishing a prima facie of age discrimination.

Similarly, the court finds that the plaintiff was not constructively discharged. To constitute a constructive discharge, an employer, either through action or inaction, must deliberately render an employee's working conditions so intolerable that the employee is left with no choice but to end his employment. Turner v. Honeywell Fed. Mfg. & Techs., LLC, 336 F.3d 716, 724 (8th Cir. 2003); Tidwell, 93 F.3d at 494 ("To constitute a constructive discharge, the employer must deliberately create intolerable working conditions with the intention of forcing the employee to quit and the employee must quit."). The intent requirement can be satisfied by the plaintiff demonstrating that his resignation was a "reasonably foreseeable consequence of the employer's discriminatory actions." Id. (citing Hukkanen v. International Union of Operating Eng'rs, 3 F.3d 281, 285 (8th Cir. 1993)). Constructive discharges arise "only when a reasonable person would find the conditions of employment intolerable." Id. "To act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged." Id. (citing West v. Marion Merrell Dow, Inc., 54 F.3d 493, 498 (8th Cir. 1995)).

The plaintiff does not present sufficient evidence from which a reasonable jury could conclude that the defendant rendered his working conditions so intolerable as to cause his retirement and that the defendant intended or reasonably foresaw this result.

Plaintiff's title, job duties, salary, and benefits, were unaffected by the shift transfers. The plaintiff claims to have complained to Slaught regarding the first transfer and to Parks at some time, but he never took the complaint through other available channels, despite his familiarity with them. Slaught denied that the plaintiff's age played any role in the decision and the plaintiff took it no further. Parks does not recall the conversation with the plaintiff and the plaintiff cannot remember the date it occurred. Gartman v. Gencorp Inc., 120 F.3d 127, 130 (8th Cir. 1997) (noting the plaintiff's obligation in being reasonable includes an obligation not to assume the worst and not to jump to conclusions too fast). The plaintiff worked on third and later second shift for eight months prior to his retirement. See Wensel v. State Farm Mut. Auto. Ins. Co., 218 F. Supp.2d 1047, 1065 (N.D. Iowa 2002) (finding plaintiff's actions in continuing to work for approximately four months following the impetus for her decision to resign demonstrated that she did not consider her conditions to be so intolerable that she was required to resign). Finally, the plaintiff has set forth no admissible evidence that the defendant's actions in transferring him to other shifts were taken with the intention of forcing the plaintiff to quit. As the plaintiff cannot establish his prima facie case of age discrimination, summary judgment must enter.

Upon the foregoing,

IT IS ORDERED that defendant's motion for summary judgment (docket number 26) is granted. Defendant's November 29, 2004 motion to compel and for sanctions (docket number 21) is denied as moot.

January 26, 2005.

JOHN A. JARVEY
Magistrate Judge
UNITED STATES DISTRICT COURT